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I. Introduction

Traditional notions of liability do not easily apply to the relationship between an estate attorney and beneficiaries of the estate. No direct attorney-client relationship exists; the attorney is hired by the estate's personal representative — not by the beneficiaries.[1] The beneficiaries, thus, are considered third parties to the agreement between the attorney and the personal representative. This does not mean, however, that liability does not, or should not, exist when the attorney's acts or omissions cause harm to the beneficiaries.

Traditional arguments provide that attorneys owe no duty to anyone other than their clients, with whom they are in privity.[2] Even today, the extent of an attorney's liability to third parties is difficult to determine because of the broad range of possibilities in which an attorney's actions might affect someone who is not her client.[3] It is virtually impossible to create a general rule to encompass every situation involving an attorney and the various persons that attorney's actions may affect throughout the course of

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1. This individual is generally referred to as a personal representative or executor when appointed by the testator, or an administrator when appointed in the event of intestacy. *See infra* notes 20-22 and accompanying text. For purposes of this Article, the distinction between the two is superfluous as the fiduciary duties owed by this individual to the estate beneficiaries are identical. Hereinafter the estate fiduciary, therefore, will be referred to as the "personal representative."

2. *See* National Sav. Bank v. Ward, 100 U.S. 195 (1879); *see also infra* text accompanying notes 64-74.

3. Examples include: successful representation of an accused criminal who later commits a crime; divorce litigation that negatively impacts the economic well-being of the children involved; drafting wills for a testator who wishes to disinherit his children.

representation.[4] Rather, because of the unique nature of representation, each situation must be evaluated separately and on its own merits.

However, recent decisions in both contract and tort have expanded the concept of attorney liability to third parties beyond conventional boundaries. Terms such as "third party" and "foreseeable" beneficiaries, never before found in legal malpractice cases, now appear throughout these decisions and commentaries,[5] as courts have begun to acknowledge that denial of recovery forces innocent parties to bear the unfortunate consequences of an attorney's conduct.[6]

To fully understand the potential for injustice experienced by third party estate beneficiaries, we must first examine an attorney's duty vis-a-vis the personal representative and the nature of estate administration. The testator, or the state in the case of intestacy, chooses the personal representative to administer the estate of a decedent.[7] This personal representative is a facilitator whose purpose is to marshal the decedent's assets and to distribute them in accordance with the desires of the decedent or the applicable state intestacy law. It is the personal representative's responsibility and duty to administer the estate effectively and quickly for the benefit of the beneficiaries.[8]

In order to fulfill this role, personal representatives generally hire attorneys to assist them in performing their duties. The attorney-client and the personal representative-beneficiary relationships, thus, are integral to estate administration. The attorney owes a duty to the personal representative,[9] who in turn owes a duty to the beneficiaries.[10] In either instance, when the duty owed is breached, the respective breaching party will be held liable to those she has injured.

Several theories exist regarding whether an attorney may be held liable to third party beneficiaries as an injured class. Many courts view the personal representative-beneficiary relationship as

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4. But see *infra* notes 108-18 and accompanying text discussing the "foreseeability" approach to the problem.

5. *See generally infra* text accompanying notes 75-80.

6. *See generally* Ellen S. Eisenberg, Note, *Attorneys' Negligence and Third Parties*, 57 N.Y.U. L. REV. 126 (1982). *See also infra* text accompanying notes 108-18.

7. *See infra* notes 20-22 and accompanying text.

8. *See infra* notes 23, 24 and accompanying text.

9. *See infra* text accompanying notes 45-56.

10. *See infra* notes 36-40 and accompanying text.

potentially adversarial, and as a result refuse to recognize a duty owed by the attorney to the beneficiaries. Recognizing an attorney-beneficiary relationship would impose another duty upon an attorney, which might potentially conflict with the original duty owed to her client, the alleged adversary to the beneficiary.[11] Still other courts choose to acknowledge a duty owed to beneficiaries whether this duty is owed directly or indirectly, and correspondingly hold attorneys responsible to third party beneficiaries. Thus, given the complexities of the problem, no general theory currently exists that may be universally applied in analyzing the personal representative-beneficiary-attorney relationship.

However, one approach appears to meet this universal goal. This approach recognizes a duty running from the attorney, through the hiring personal representative, to the estate beneficiaries. Under this approach, no restriction is placed on the level of duty owed by the attorney to the beneficiaries. The attorney owes the same duty as that owed to the personal representative. While this duty may be seen as derivative, a more accurate assessment reveals that the duty owed by the attorney passes through the hiring personal representative to the beneficiaries.

This "pass through privity" approach offers several benefits.[12] First, this approach recognizes the nature of estate administration and the nature of fiduciary responsibilities. Pass through privity focuses on the ultimate goals of administering the estate, and not on the parties involved in its administration. Second, pass through privity allocates the risks associated with estate administration on the attorney, not the estate beneficiaries. This notion satisfies the societal need to protect the beneficiaries as innocent parties. Third, pass through privity is very selective in imposing liability, and as a result, this approach poses no danger of opening the floodgates to frivolous litigation because the attorney's duty applies only to those who share a fiduciary relationship with the party hiring the attorney.

Despite the stated advantages of a pass through privity approach in recognizing an attorney-beneficiary relationship, this

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11. *See generally* RONALD E. MALLEN & JEFFREY M. SMITH, 1 LEGAL MALPRACTICE §§ 7.1-7.13 (3d ed. 1989) [hereinafter MALLEN]. *See also* Rutkowski v. Hollis, 600 N.E.2d 1284 (Ill. App. Ct. 1992); Trask v. Butler, 872 P.2d 1080 (Wash. 1994); Hopkins v. Akins, 637 A.2d 424 (D.C. App. 1993); Goldberg v. Frye, 266 Cal. Rptr. 483 (Cal. Ct. App. 1990).

12. "Pass through privity" is a term used in this Article to describe a particular approach. The term has not been used by any other commentator or court.

Article examines all of the relationships and relevant issues involved in estate administration. Part II provides a brief overview of estate administration. Part III discusses the personal representative-beneficiary relationship. Part IV examines the attorney-client relationship and the ethical duties imposed upon the attorney. Part V discusses the basis of the legal malpractice action. Finally, Part VI addresses the various theories underlying attorney liability to third parties, and concludes that a pass through privity approach is the appropriate method for recognizing a duty owed by the estate attorney to the estate beneficiaries.

II. Estate Administration and the Nature of the Estate

Analysis of estate administration requires an understanding of estate planning. An individual's right to pass property by devise is a privilege granted by law.[13] Essentially, every individual has a right to dispose of property as he sees fit, and to determine how and to whom this property shall go.[14] This right is recognized as fundamental to both public policy and the legal order of our society.[15] At least one court has even stated that no right of a citizen is more valued.[16]

As such, the law gives great deference to a testator's desires. With the exception of his wife, a testator may completely disinherit anyone, including his children and closest relatives. Furthermore, the testator may disinherit these individuals for any reason or no reason at all.[17] However, in the event a testator dies without having made a will, the state in which the testator is domiciled will

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13. The right to devise property, as well as the method of conveying and manner of creating estates, are purely statutory and may be changed by the legislature in its discretion. *See, e.g.,* Estate of Burnison, 204 P.2d 330 (Cal. 1949), *aff'd*, U.S. v. Burnison, 339 U.S. 87 (1950); Classen v. Heath, 58 N.E.2d 889 (Ill. 1949); Knowle's Estate, 145 A. 797 (Pa. 1929).

14. *See* San Diego Trust & Sav. Bank v. Heustis, 10 P.2d 158 (Cal. Ct. App. 1932); *In re* Estate of Haines, 366 N.E.2d 548 (Ill. App. Ct. 1977); Paul Will, 180 A.2d 254 (Pa. 1962). Note, however, that a transfer may not be illegal or contrary to public policy. *See* Lydick v. Tate, 44 N.E.2d 583 (Ill. 1942); Mohler's Estate, 22 A.2d 680 (Pa. 1941) (establishing criteria as to when a bequest contravenes the recognized interests of society).

15. *See* Jacobs v. Gerecht, 86 Cal. Rptr. 217 (Cal. App. Ct. 1970); *see also* Arbulich v. Arbulich, 257 P.2d 433 (Cal. 1953); *In re* Nole's Will, 46 N.Y.S.2d 429 (N.Y. App. Div. 1944).

16. *In re* Gayman's Estate, 21 Northumb. Legal J. 149 (Pa. Orphans' Ct. 1949).

17. However harsh and unnatural a testamentary devise may seem when it disinherits a child, it is within the legal power of a competent testator to will his property as he sees fit. *See* Hart v. Gudger, 314 P.2d 549 (Cal. 1957); Budlong v. Los Angeles Bible Inst., 16 N.E.2d 810 (Ill. App. Ct. 1938); *In re* Little's Estate, 170 A.2d 106 (Pa. 1961).

provide a plan for distribution.[18] State statutes, whether derived from common law or civil law, invariably parcel the property in accordance with the natural law of consanguinity.[19] In either case, a testator's property is intended to be distributed fairly and efficiently.

To distribute this property, an estate requires an individual to be in charge of its affairs. Thus, prior to death, a testator may designate a personal representative.[20] This representative is to ensure that the testator's property passes to his heirs in accordance with his wishes.[21] If the testator fails to execute a will or name a personal representative, the state will appoint an administrator.[22] This administrator performs relatively the same functions as a personal representative in administering the assets of the estate.

The sole purpose of estate administration, and the sole duty of a personal representative, is to carry out the intent of the decedent or the purpose of the state intestacy laws.[23] Primarily, this duty requires the personal representative to administer the estate speedily, orderly, and to the best advantage of all concerned.[24]

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18. *See, e.g.*, U.P.C. §§ 2-102, to 2-114 (1983); CAL. PROB. CODE §§ 6401, 6402, 6402.5 (West 1991); ILL. REV. STAT. ch. 755 para. 5/2-1 (1992); OHIO REV. CODE ANN. §§ 2105.06-2105.063, 2105.10-2105.14 (Baldwin 1994); 20 PA. CONS. STAT. ANN. §§ 2101-14 (Supp. 1995).

19. The principle that an individual's intestate property shall go to his own next of kin has at all times been recognized and preserved by state statute. *See, e.g.*, U.P.C. §§ 2-102, 2-103 (and the official comments thereto); *see also* Dunlap v. Lynn, 89 N.W.2d 58 (Neb. 1958); *In re* Long's Estate, 67 P.2d 41 (Okla. 1936).

20. Persons appointed by will are usually referred to as "executors" or "personal representatives." *See, e.g., In re* Estate of Spaits, 453 N.E.2d 39 (Ill. App. Ct. 1983), *rev'd on other grounds*, 472 N.E.2d 784 (Ill. 1984).

21. Appointment is presumably granted to the executor named in the will by the testator. *See, e.g.*, Matter of Faught's Estate, 445 N.E.2d 54 (Ill. App. Ct. 1983); *In re* Nagle's Estate 317 N.E.2d 242 (Ohio Ct. App. 1974). Note, however, that this right is subject to approval by the court. *See* U.P.C. § 3-103; 20 PA. CONS. STAT. § 3155 (Supp. 1995); *see also* Lindley v. U.S., 59 F.2d 336 (9th Cir 1932); *In re* Fiddyment's Estate, 168 P.2d 61 (Cal. Dist. Ct. App. 1946); Hermann v. Crossen, 160 N.E.2d 404 (Ohio Ct. App. 1959); *In re* Chesney's Estate, 22 Northumb. Legal J. 103 (Pa. Orphans' Ct. 1950). For the proposition that the law will disqualify certain individuals from serving as personal representative, see *In re* Kelly's Will, 235 N.Y.S. 683 (N.Y. Surrogate's Ct. 1929); *In re* Craig Estate, 32 Som. L. J. 255 (Pa. Orphans' Ct. 1976).

22. *See, e.g.*, CAL. PROB. CODE § 8460 (West 1991); 20 PA. CONS. STAT. ANN. § 3155 (Supp. 1995). An individual appointed in the event of intestacy is usually referred to as an "administrator." *In re* Publicker's Estate, 123 A.2d 655 (Pa. 1956).

23. *See* U.P.C. § 3-703; *see also* Graybar Elec. Co. v. McClave, 371 P.2d 350 (Ariz. 1962); Hecker v. Schuler, 231 N.E.2d 877 (Ohio 1967).

24. *See, e.g., In re* Cunningham's Estate, 305 P.2d 920 (Cal. Ct. App. 1957); *In re* Van Valkenburgh's Will, 298 N.Y.S. 819 (N.Y. Surrogate's Ct. 1937); *In re* Wright's Estate, 133 N.E.2d 350 (Ohio 1956); *In re* Wallis' Estate, 218 A.2d 732 (Pa. 1966).

Personal representatives are instrumentalities appointed for the purpose of ensuring that the decedent's debts are paid and the remainder of the decedent's estate is distributed to the beneficiaries.

Understanding the role of the personal representative in estate administration clarifies the nature of the estate. A decedent's estate is a compilation of assets and liabilities owned by the decedent prior to distribution by will or intestacy.[25] It is a conduit, recognized by both property law[26] and tax law,[27] as an effective means of passing the property of the decedent to beneficiaries and creditors.[28] However, the success of this conduit depends upon the assistance of personal representatives.

III. Nature of the Personal Representative-Beneficiary Relationship

Given the nature and weight of his duties, the personal representative is generally cloaked with a significant amount of power.[29] For example, most statutes provide that "title" to a decedent's property passes to the beneficiaries but is subject to possession by the personal representative for the purpose of

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25. BLACK'S LAW DICTIONARY 379 (6th ed. 1991); *see also* Hansen v. Stanton, 31 P.2d 903 (Wash. 1934).

26. *See In re* Brunet's Estate, 207 P.2d 567, 569 (Cal. App. Ct. 1949); *see also In re* Glass, 130 P. 868 (Cal. 1913); Gardner v. Anderson, 227 P. 743 (Kan. 1924). Note that these cases deal with testamentary gifts to either the testator's or another's estate. There is contrary authority regarding this issue. However, those cases hold that the gift was actually through the estate to the intended beneficiaries rather than to the estate itself. There is little authority holding that an estate is an entity. *See* B.C. Ricketts, Annotation, *Validity, Construction, and Effect at Bequest or Devise to a Person's Estate, or to the Person or His Estate*, 10 A.L.R.3d 483 (1966).

27. Decedent and his estate are separate tax entities for income tax purposes. *See* 26 U.S.C. 641 (1988); *see also* Biewer v. Commissioner, 341 F.2d 394 (6th Cir. 1965); Davidson v. United States, 149 F. Supp. 208 (Ct. Cl. 1957).

28. For purposes of determining who should bear the burden of estate income tax, Congress has adopted the conduit principle under which an estate is treated as a taxable entity and is taxed, in general, on income realized but not distributed to the beneficiaries. When income is distributed to the beneficiaries, it is not taxable to the estate, but instead is taxable to the beneficiaries. *See* Mott v. United States, 462 F.2d 512 (Ct. Cl. 1972), *cert. denied*, 409 U.S. 1108 (1973).

29. In the performance of his duties, a personal representative shall use the authority conferred upon him by law, the terms of the will, if any, and any order to which he is a party for the best interests of successors to the estate. *See* U.P.C. § 3-703; *see also* Hart's Estate, 48 Pa. D. & C. 101 (Erie. Co. 1943) (power granted by decedent); South Side Trust & Sav. Bank v. South Side Trust & Sav. Bank, 284 N.E.2d 61 (Ill. App. Ct. 1972); *In re* Faelchle's Estate, 89 N.E.2d 96 (Ohio Prob. Ct. 1942) (power granted by state).

administration.[30] Additional powers entrusted to the personal representative may include the power to compromise any demand of the decedent,[31] continue the decedent's business,[32] sell the decedent's property,[33] lease and collect rents on the decedent's property,[34] and invest estate assets.[35] These powers enable the representative to more easily meet the objectives set forth by the testator or the intestacy laws.

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30. At common law, only personal property was subject to the control of the executor. The Land Transfer Act of 1897, however, provides that land as well as chattels vest in the decedent's personal representative. Land Transfer Act of 1897, 60 & 61 Vict. ch. 65 § 1; 3 AMERICAN LAW OF PROP. § 14.6 (1952). Most modern statutes provide that title to a decedent's property, both real and personal, passes to the devisees or heirs subject to the possession of the executor. *See, e.g.*, U.P.C. §§ 3-709, 3-711; Cal. Prob. Code § 300 (West 1991); *see also In re* Elwell's Estate, 274 N.E.2d 902 (Ill. App. Ct. 1971). However, if the property is in the possession of a beneficiary and is not needed for purposes of administration, the personal representative has no right or duty to take possession of it. *In re* Brill's Will, 144 N.Y.S.2d 464 (Surrogate's Ct. 1955); Fitch v. Oesch, 281 N.E.2d 206 (Ohio Prob. Ct. 1971); Pierce Estate, 20 Pa. D. & C.2d 51 (1950), *aff'd*, 160 A.2d 205 (Pa. 1960).

31. *See* 20 PA. CONS. STAT. ANN. § 3323 (1975); *see also* Green v. Benson, 271 F. Supp. 90 (E.D. Pa. 1967); Love v. Wolf, 58 Cal. Rptr. 42 (Cal. Ct. App. 1967); *In re* Bertrand's Estate, 82 N.Y.S.2d 458 (N.Y. Surrogate's Ct. 1948); Yoffe Estate, 9 Pa. D. & C.2d 281 (Pa. Orphans' Ct. 1956). Note, however, that the personal representative is limited by the letters of administration and must act honestly and reasonably. *See, e.g.*, Edelstien v. Old Colony Trust Co., 147 N.E.2d 193 (Mass. 1958); Gateway Trading Co. v. Children's Hosp. of Pittsburgh, 265 A.2d 115 (Pa. 1970).

32. While a personal representative may not ordinarily engage in business with estate funds, exceptions will be made when continued operation is necessary for protection of the estate or is authorized by will, statute, or court order. *See, e.g.*, U.P.C. § 3-715 (24); *see also In re* Szantay's Estate, 235 N.E.2d 861 (Ill. App. Ct. 1968); Bowen v. Lewis, 426 P.2d 244 (Kan. 1967); *In re* Sulzer's Estate, 185 A. 793 (Pa. 1936); New York Merchandise Co. v. Stout, 264 P.2d 863 (Wash. 1954).

33. A power of sale may be granted by court order, statute, or will. When there is a will, a personal representative may sell the testator's real property for any lawful purpose to which the testator wishes the proceeds to be applied. This power may be either express or implied. *See, e.g.*, Schroeder v. Benz, 138 N.E.2d 496 (Ill. 1956); *In re* Schaffer's Estate, 61 A.2d 872 (Pa. 1948). In contrast, absent a statute to the contrary, a personal representative has an absolute power to sell the personal property of a decedent's estate as he sees fit. *In re* Estate of Germond, 483 P.2d 769 (Cal. 1971); *In re* Furst's Estate, 168 N.Y.S.2d 104 (Surrogate's Ct. 1957).

34. As with a power of sale, authority to lease a decedent's real property may be granted by court order, statute, or will. *See, e.g.*, *In re* Well's Will, 26 N.Y.S.2d 604 (1941); Quality Lumber & Millwork Co. v. Andrus, 200 A.2d 754 (Pa. 1964). A power to lease also may arise, however, by reason of terms of a prior lease existing at the time of the decedent's death. O'Connor v. Chiascione, 33 A.2d 336 (Conn. 1943); Wisotzkey Estate, 1 Adams Co. Legal J. 43 (Pa. Orphans' Ct. 1959); *In re* Mundt Estates, 14 P.2d 59 (Wash. 1932).

35. While the responsibilities of a personal representative or administrator are generally limited to the collection and distribution of estate assets, a duty to invest may be imposed upon him either by will or by statute. *See In re* Flynn's Will, 73 N.Y.S.2d 408 (Surrogate's Ct. 1947); McFadden Estate, 34 Del. Co. Rep. 503 (Pa. Orphans' Ct. 1946).

As mentioned, the personal representative is appointed for the purpose of handling the assets and conducting the business of the estate in accordance with the intent of the testator. He is held to the highest degree of good faith in performing these duties,[36] and owes a "fiduciary" responsibility to the estate beneficiaries. Thus, the standards to which the personal representative is held in performing this duty are among the highest imposed by law.[37] For instance, self-dealing and intermingling of estate funds with those of the personal representative are either strictly prohibited or severely restricted.[38] If any such conflicts arise, courts are often compelled to remove an offending personal representative.[39] Most states, recognizing the power of the personal representative and the dangers of abuse, require personal representatives to account for their actions in court.[40] Hence, to avoid such scrutiny, a representative must maintain the utmost level of care and loyalty until the closing of the estate or the discharge of his duty.

Once a personal representative is appointed, his authority continues until the estate has been completely administered, or until the personal representative dies, resigns, or is removed.[41]

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36. *See* Blair v. Mahon, 230 P.2d 832 (Cal. Ct. App. 1951); Redmer v. Hakala, 99 N.E.2d 831 (Ill. App. Ct. 1951); *In re* Chambers' Estate, 36 N.E.2d 175 (Ohio Ct. App. 1941), *appeal dismissed*, 24 N.E.2d 601 (Ohio 1939); *In re* Craig's Estate, 109 A.2d 190 (Pa. 1954); *In re* Peterson's Estate, 123 P.2d 733 (Wash. 1942).

37. *See* BLACK'S LAW DICTIONARY *supra* note 25, at 625.

38. In general, fiduciaries may not buy from or sell to themselves. *See* V.P.C. § 3-713 (1983). Likewise, commingling of estate funds with those of the personal representative is prohibited. *See* RESTATEMENT (SECOND) OF TRUSTS § 179 (1959); Matter of Glavin, 625 N.Y.S.2d 311 (N.Y. 1995). In some instances, such actions may warrant removal, even when the personal representative restores the funds. *See* U.P.C. § 3-713; Matter of Chapman's Estate, 433 N.E.2d 313 (Ill. Ct. App. 1982); Matter of Garwood's Estate, 400 N.E.2d 758 (Ind. 1980).

39. A personal representative should be removed whenever a conflict of interest arises that interferes with the objective administration of the estate. *See In re* Estate of Devoy, 596 N.E.2d 1339 (Ill. App. Ct. 1992); *In re* Staufer's Estate, 57 N.E.2d 145 (Ohio Ct. App. 1944). Any sale to the personal representative of estate property is a conflict of interest. *See* U.P.C. § 3-713.

40. *See* TEX. PROB. CODE ANN. § 399 (West Supp. 1995); MASS. GEN. L. ch. 206, § 1 (1990); OHIO REV. CODE ANN. § 2109.30 (Baldwin 1995). Note, however, that in states that allow "independent administration," fiduciaries are free from court supervision. *See* U.P.C. § 3-1003(a) (If administration is not supervised, a personal representative may close an estate by simply filing a statement that he has given an account to the beneficiaries.).

41. *See* Estate of MacLeish, 342 N.E.2d 740 (Ill. App. Ct. 1976) (an executor must fulfill his responsibilities until he is discharged from office); *see also* RESTATEMENT (SECOND) OF TRUSTS § 196, cmt. f (1959). *But see* ILL. REV. STAT. ch. 760, para. 5/12 (1992) (trustee can resign by giving notice); CAL. PROB. CODE § 15640 (West 1991) (consent of adult beneficiaries sufficient).

Estate administration is generally considered "complete" once the decedent's debts have been paid and all distributions have been made among the beneficiaries.[42] Many jurisdictions require a final accounting and court approval followed by a formal discharge before the personal representative will be relieved of his duties.[43] Only when the personal representative is discharged will his powers and liabilities with respect to the estate and the beneficiaries cease.[44]

IV. Nature of the Attorney-Client Relationship

Attorneys, as officers of the court, must conform to the highest of ethical standards, both in their professional and personal lives.[45] Their conduct must secure and preserve the respect and confidence of the public in both the legal profession and the judicial system as a whole.[46] Attorneys are bound by integrity, honesty, and professional decorum to conduct themselves with candor, competence, and fairness.[47]

In conforming with these standards, an attorney is obliged to act "with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf."[48] An attorney's responsibilities are those of a "fiduciary," involving the highest

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42. A personal representative's power and duty to administer the estate will continue as long as the personal representative controls assets subject to valid claims. *See* Johnston v. Schwenck, 124 N.E. 61 (Ohio 1918); *see also* CAL. PROB. CODE § 12251 (West 1991); OHIO REV. CODE ANN. § 2113.03 (Baldwin 1995); 20 PA. CONS. STAT. ANN. § 3184 (1975).

43. *See, e.g.*, 20 PA. CONS. STAT. ANN. § 3533 (1975); *In re* Thompson's Estate, 97 S.W.2d 93 (Mo. 1936); Wiseman's Estate, 12 Phila. Reports 11 (Pa. Orphans' Ct. 1877).

44. Executors who have been duly discharged are relieved of all powers and liabilities related to administering the estate. *See* Johnston v. Long, 181 P.2d 645 (Cal. 1947); *In re* Courtin, 81 So. 457 (La. 1919); Sheet's Estate, 25 Pa. D. 383 (Pa. Orphans' Ct. 1916).

45. Admission to the bar requires good moral character as well as proficiency in the law. *See, e.g.*, Ross v. Reda, 510 F.2d 1172 (6th Cir.), *cert. denied*, 423 U.S. 892 (1975); *In re* Clark, 134 N.E.2d 281 (Ill. 1956); Toledo Bar Ass'n v. Auwaerter, 430 N.E.2d 947 (Ohio 1982); *In re* Carson, 378 P.2d 450 (Wash. 1963).

46. Persons dealing with an attorney have a right to rely upon the professional endorsement of the attorney's honesty and integrity by the bar and the courts. *See, e.g.*, Resnik v. State Bar, 460 P.2d 969 (Cal. 1969); *In re* Lingle, 189 N.E.2d 342 (Ill. 1963).

47. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3, 1.1, 3.4; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A), 7-101(A), 6-101, EC 101; *see also* Schlosser v. Jursich, 410 N.E.2d 257 (Ill. App. Ct. 1980).

48. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1; *see also* People v. Johnson, 95 Cal. Rptr. 316 (Cal. Ct. App. 1971); Ruggiero v. Attore, 366 N.E.2d 470 (Ill. App. Ct. 1977); Hawkins v. King County, 602 P.2d 361 (Wash. Ct. App. 1979).

degrees of trust and confidence.[49] Once an attorney agrees to represent an individual, she must maintain strict confidentiality of information relating to that representation.[50] This responsibility is intended to encourage the client to communicate freely and completely with his attorney. As a result, the client's trust and the attorney's loyalty form the basis for a productive working relationship.[51] Thus, when the client's trust is breached by the attorney's negligence or misconduct, the attorney is accountable and may be held liable for malpractice.[52]

The attorney's duty of loyalty to her client represents the greatest barrier to recognizing multiple duties on the part of an attorney during estate administration. Since the attorney is hired by the personal representative, courts have been reluctant to impose a duty upon attorneys to protect estate beneficiaries because of the perceived conflict that may arise between the interests of the personal representative and estate beneficiaries.

Rules prohibiting such potential conflicts provide that an attorney representing one client cannot fairly represent or advise an adverse party.[53] The rationale is self evident: representation of potentially adverse interests impairs the attorney's professional judgment.[54] However, an attorney may represent two clients whose interests do not conflict in any significant degree provided, of course, that the attorney provides full disclosure to the parties and that the parties consent to representation by the attorney.[55]

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49. *See* Christison v. Jones, 405 N.E.2d 8 (Ill. App. Ct. 1980); Matter of Stein, 483 A.2d 109 (N.J. 1984); Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa. 1992). Attorneys hold the status of fiduciaries vis-a-vis their clients. *See, e.g.*, Hewitt v. Hewitt, 17 F.2d 716 (9th Cir. 1927); Sodikoff v. State Bar, 535 P.2d 331 (Cal. 1975); Greene v. First Nat'l Bank, 516 N.E.2d 311 (Ill. App. Ct. 1987); Hood v. Kline, 212 P.2d 110 (Wash. 1949).

50. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6.

51. *See* Adams v. Fleck, 154 N.E.2d 794 (Ohio Prob. Ct. 1959), *aff'd*, 172 N.E.2d 126 (Ohio 1961) (lawyers are in positions of trust when undertaking any task for a client).

52. An attorney's duty to act in good faith and with the highest degree of fidelity holds the attorney responsible for damages resulting from a breach of that duty. *See, e.g.*, Norton v. Hines, 123 Cal. Rptr. 237 (Cal. Ct. App. 1975); Suppressed v. Suppressed, 565 N.E.2d 101, (Ill. App. Ct. 1990), *appeal denied*, 571 N.E.2d 156 (1991).

53. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1995).

54. An attorney cannot serve two masters. *See, e.g.*, People v. Davis, 309 P.2d 1 (Cal. 1957); People v. Coslet, 364 N.E.2d 67 (Ill. 1977); Seifert v. Dumatic Indus. Inc., 197 A.2d 454 (Pa. 1964); Pacific Coast Cement Co. v. Metropolitan Casualty Ins. Co., 23 P.2d 890 (Wash. 1933).

55. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1995). Attorneys who represent parties with divergent interests owe the highest duty to disclose all facts which are necessary to enable the parties to make a fully informed consent to the representation. *See,*

The test applied to determine whether an attorney should be prevented from representing conflicting interests is not actuality of conflict but the possibility that a conflict might arise.[56] Thus, it is under these standards that an attorney's action must be evaluated vis-a-vis the estate beneficiaries and personal representative.

V. The Legal Malpractice Claim

A. Essential Elements

Legal malpractice claims may be based on a number of theories.[57] Usually, however, an attorney is sued under contract or tort theories.[58] Regardless of the basis for the claim, the essential elements are the same, and include: (1) the attorney undertook to provide legal services on the plaintiff's behalf, or some other basis for duty; (2) the attorney failed to exercise ordinary skill, knowledge, and judgment in rendering these legal services; (3) the plaintiff suffered actual injury; and (4) the attorney's failure to exercise the requisite skill and knowledge demanded by the law proximately caused the plaintiff's injuries.[59]

While this Article focuses upon the first element, establishment of duty, the importance of the other elements should not be ignored. For instance, a plaintiff bears the burden of proving that the attorney failed to exercise ordinary skill, knowledge, and

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e.g., Klemm v. Superior Court, 142 Cal. Rptr. 509 (Cal. Ct. App. 1977); Maryland Casualty Co. v. Peppers, 355 N.E.2d 24 (Ill. 1976); Slater v. Rimar, Inc., 338 A.2d 584 (Pa. 1975); Matter of Lauderdale's Guardianship, 549 P.2d 42 (Wash. Ct. App. 1976). To have full disclosure, an attorney must explain to her clients that she is going to represent both of them. An attorney also must explain the nature and extent of the conflict of interest in sufficient detail that both clients can understand why it may be desirable for each to have independent counsel. *See, e.g.*, Lysick v. Walcom, 65 Cal. Rptr. 406 (Cal. Ct. App. 1968); Jedwabny v. Philadelphia Transp. Co., 135 A.2d 252 (Pa. 1957).

56. *See, e.g.*, *In re* Becker, 158 N.E.2d 753 (Ill. 1959); Pirillo v. Takiff, 341 A.2d 896, *reinstated*, 352 A.2d 11 (Pa. 1975).

57. *See generally* MALLEN *supra* note 11.

58. *See* Garcia v. Community Legal Serv. Corp., 524 A.2d 980 (Pa. Super. Ct. 1987). *But see* Chicago Title Ins. Co. v. Holt, 244 S.E.2d 177 (N.C. Ct. App. 1978) (emphasizing the contractual nature of the attorney-client relationship and denying the cause of action for negligence).

59. *See* Garris v. Severson, Merson, Berke & Melchior, 252 Cal. Rptr. 204 (Cal. Ct. App. 1988); Sexton v. Smith, 492 N.E.2d 1284 (Ill. 1986); David v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A., 607 N.E.2d 1173 (Ohio Ct. App. 1992); Bailey v. Tucker, 621 A.2d 108 (Pa. 1993).

judgment in rendering legal services.[60] An attorney will not be held liable for malpractice as long as she employs such judgment as is expected by the standards of the law and the profession.[61] To meet this burden of proof, the plaintiff generally will have to obtain experts in the legal profession to establish the applicable standard of care and the attorney's subsequent breach thereof.[62] Finally, the plaintiff must show that the attorney's negligence was the proximate cause of the plaintiff's actual injury.[63]

Thus, establishing the requisite duty is only the initial criterion and does not alone establish legal malpractice. To succeed in a claim of malpractice, a plaintiff must jump through several hoops. As mentioned above, he must set forth not only the existence of a duty, but that this duty was breached and proximately caused the plaintiff's injuries. Thus, while the existence of a duty does not in and of itself win a malpractice claim, it forms the essential basis of such a claim.

B. The Threshold of Duty

Regardless of whether a legal malpractice claim is brought under a contract or tort theory, a plaintiff must cross the initial

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60. An attorney must be held to the same standard of care as other professionals. Schenkel v. Monheit, 405 A.2d 493 (Pa. Super. Ct. 1979).

61. Attorneys will be held liable to their clients for damages resulting from their failure to exercise the degree of care and skill expected from the legal profession. *See, e.g.*, Gray v. Hallett, 525 N.E.2d 89 (Ill. App. Ct.), *appeal denied*, 530 N.E.2d 245 (Ill. 1988); Schenkel v. Monheit, 405 A.2d 493 (Pa. Super Ct. 1979). However, attorneys are not liable for poor judgment. *See, e.g.*, York v. Stiefel, 440 N.E.2d 440 (Ill. App. Ct. 1982), *modified*, 458 N.E.2d 488 (Ill. 1983). Liability will not attach for lack of knowledge of the law when a doubtful or debatable point is involved. *See, e.g.*, Howard v. Sweeney, 499 N.E.2d 383 (Ohio Ct. App. 1986).

62. *See* Hirschberger v. Silverman, 609 N.E.2d 1301 (Ohio Ct. App. 1992); Gans v. Gray, 612 F. Supp. 608 (E.D. Pa. 1985). Expert testimony is required to establish the requisite standard of care in a legal malpractice action unless common knowledge or experience of the layperson is extensive enough to recognize or infer negligence from the facts, or when an attorney's negligence is so grossly apparent that a layperson would have no difficulty appraising it. *See* Barth v. Reagan, 564 N.E.2d 1196 (Ill. 1990).

63. Before legal malpractice can occur, the plaintiff must have incurred damages that were directly and proximately caused by the attorney's actions. *See, e.g.*, Sheppard v. Krol, 578 N.E.2d 212 (Ill. App. Ct. 1991); Northwestern Life Ins. Co. v. Rogers, 573 N.E.2d 159 (Ohio Ct. App. 1989). The plaintiff bears the burden of proving that damages resulted. *See, e.g.*, Duke & Co. v. Anderson, 418 A.2d 613 (Pa. Super. Ct. 1980). Once a plaintiff has introduced evidence that an attorney's negligent act or omission increased the risk of harm to a person in the plaintiff's position, and that harm was in fact sustained, it becomes a question for the jury as to whether that increased risk of harm was a substantial factor in producing the harm. *See, e.g.*, Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978).

threshold by establishing a duty owed to him by the attorney.[64] This is most easily accomplished by showing that the attorney and the injured party were in direct privity with one another through an attorney-client relationship.[65] Direct privity exists pursuant to a contract theory where the attorney and client enter into an agreement. Under this theory, the existence of an agreement necessarily establishes the requisite duty needed for a potential malpractice claim. Such a duty mandates that the attorney perform a specific act or service,[66] and only upon a showing that the attorney failed to fulfill this duty will the plaintiff be able to substantiate a breach.[67]

In addition to this contract theory, direct privity also arises as a result of merely hiring an attorney with the mutual understanding that she will undertake representation of the client with ordinary skill and knowledge.[68] The hiring of an attorney invokes the attorney's duty to act with the utmost good faith and loyalty. Establishing the requisite duty in this manner enables the plaintiff to begin to form a cause of action in tort. Thus, by showing the requisite duty, the plaintiff has established the initial element of a malpractice claim.

Historically, a demonstration of privity was necessary to support a legal malpractice claim under either theory.[69] Even

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64. *See* Hughes v. Consol-Pa. Coal Co., 945 F.2d 594 (3d Cir. 1991) (to establish legal malpractice under Pennsylvania law, plaintiff must show employment of the attorney or other basis for duty owed to client).

65. The very existence of an attorney-client relationship raises a presumption of trust and confidence between the parties and consequently requires a high degree of fidelity and good faith. *See, e.g.*, *In re* Hix, 161 B.R. 401 (Bankr. N.D. Ohio 1993). The establishment of an attorney-client relationship is the most common and easiest method of demonstrating a duty running from the attorney to the plaintiff. *See, e.g.*, Zanders v. Jones, 680 F. Supp. 1236 (N.D. Ill. 1988), *aff'd*, 872 F.2d 424 (7th Cir. 1989); Fox v. Pollack, 226 Cal. Rptr. 532 (Cal. Ct. App. 1986); Canady v. Shwartz, 577 N.E.2d 437 (Ohio Ct. App. 1989).

66. *See* Houston Gen. Ins. Co. v. Superior Ct., 166 Cal. Rptr. 904 (Cal. Ct. App. 1980).

67. *See* Resolution Trust Corp. v. Farmer, 823 F. Supp. 302 (E.D. Pa. 1993); Lichow v. Sowers, 6 A.2d 285 (Pa. 1939).

68. *See, e.g.*, Lawall v. Groman, 37 A. 98 (Pa. 1897); Guy v. Liederbach, 459 A.2d 744 (Pa. 1983). An attorney-client relationship also may be implied from the conduct of the parties. *See, e.g.*, Connolly v. Wolf, Block, Schorr & Solis-Cohen, 463 F. Supp. 914 (E.D. Pa. 1978); George v. Caton, 600 P.2d 822 (N.M. Ct. App. 1979); Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980).

69. In 1879, the United States Supreme Court applied the English Rule set forth in Winterbottom v. Wright, 152 Eng. Rep. 402 (1842), holding that in the absence of fraud, collusion, or privity of contract, an individual owes no duty of care to third parties injured by his conduct. Savings Bank v. Ward, 100 U.S. 195 (1879); *see infra* notes 115-17 and accompanying text.

today, the privity requirement remains substantially intact, reinforced by the adversarial nature of our legal system, which requires undivided loyalty and zealous representation of a client.[70] Therefore, any failure to cross this threshold typically results in a failure of the malpractice claim.

C. *Failure to Cross the Duty Threshold*

Failure to establish privity is synonymous with failure to establish an attorney-client relationship and usually is fatal to a legal malpractice claim. An attorney cannot be negligent for failing to do what there is no duty to undertake.[71] Any suggestion that an attorney owes a duty to someone other than her own client usually is rejected. The rationale is that a rule giving rise to a duty owed to a third party violates the notions of loyalty and zealous representation that support and perpetuate the public's faith in the legal system.[72] Pursuant to this theory, an attorney only owes a duty of utmost good faith and loyalty to her client, not third parties. To allow otherwise raises concerns that (1) third party actions deny the attorney and the client control over their own agreement, and (2) a duty owed by an attorney to the general public imposes potentially huge liability on attorneys in general.[73] Thus, absent special circumstances, it is fairly well established that an attorney owes no duty to third parties, and is not liable for injuries caused by the attorney's negligence, regardless of foreseeability.[74]

VI. Theories of Liability to Third Parties

Despite traditional concerns, many courts have relaxed the privity requirement in legal malpractice claims.[75] The result is

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70. *See* MALLEN, *supra* note 11, at 361.

71. *See, e.g.*, Lincoln Alameda Creek v. Cooper Indus. Inc., 829 F. Supp. 325 (N.D. Cal. 1992); Emmerson v. Adult Community Total Serv. Inc., 842 F. Supp 152 (E.D. Pa.), *aff'd*, 39 F.3d 1169 (3d Cir. 1994); Held v. Arant, 134 Cal. Rptr. 422 (Cal. Ct. App. 1977); McCoy v. Engle, 537 N.E.2d 665 (Ohio Ct. App. 1987).

72. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.3.

73. *See* Needham v. Hamilton, 459 A.2d 1060 (D.C. 1983).

74. *See, e.g.*, Favata v. Rosenberg, 436 N.E.2d 49 (Ill. App. Ct. 1982); Young v. Hecht, 597 P.2d 682 (Kan. Ct. App. 1979).

75. For instance, it is now a majority rule that an attorney who has negligently drafted a will may be liable for negligence to the intended beneficiaries or heirs. *See, e.g.*, Garcia v. Borelli, 180 Cal. Rptr. 768 (Cal. Ct. App. 1982); Needham v. Hamilton, 459 A.2d 1060 (D.C. 1983); McLane v. Russell, 512 N.E.2d 366 (Ill. App. Ct. 1987); Guy v. Liederbach, 459

greater recognition of duties owed by an attorney to third parties in certain situations. While it is impossible to generalize as to the abrogation of the privity requirement, the apparent shift is due to a recognition of the inadequacy of remedies to injured third parties and a need to deter negligent attorney conduct.[76]

In the realm of estate administration, courts have taken a number of approaches to establish, or refuse to establish, the requisite duty of care from attorney to a third party beneficiary. Some rely upon a third party beneficiary approach derived from contract law.[77] Others turn to a balancing approach based primarily upon negligence principles.[78] Still others recognize a derivative duty running from the attorney through the personal representative to the estate beneficiaries. Commentators have also thrown their hats into the ring, arguing for an assumption of duty approach,[79] or an "entity" approach.[80] The remainder of this Article will analyze each approach and its application to the attorney-personal representative-beneficiary relationship.

A. Representation of the Estate Under an Entity Approach

One method utilized by the courts to establish a duty is to recognize the estate as a separate legal entity for purposes of representation. Under this approach, the estate, rather than any one individual, is the client. This approach was taken by the Michigan Court of Appeals in *Steinway v. Bolden*.[81] In addressing the question of an attorney's liability to estate beneficiaries, the court held: "[A]lthough the personal representative retains the attorney, the estate is the client rather than the personal representative."[82] The court based this holding on the fact that the

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A.2d 744 (Pa. 1983). *But see* Deeb v. Johnson, 566 N.Y.S.2d 688 (N.Y. App. Div. 1991) (privity requirement still applies in legal malpractice actions arising out of will drafting, whether brought by intended beneficiaries or the estate); Mali v. DeForest & Duer, 553 N.Y.S.2d 391 (N.Y. App. Div. 1990) (absent special circumstances, drafter of will is not liable to estate beneficiaries or any other party not in privity who might be harmed by drafter's professional negligence).

76. *See* MALLEN, *supra* note 11, at 380.

77. *See infra* text accompanying notes 122-48.

78. *See infra* text accompanying notes 149-80.

79. Ellen S. Eisenberg, Note, *Attorney's Negligence and Third Parties*, 57 N.Y.U. L. REV. 126 (1982).

80. Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who is the Client?*, 62 FORDHAM L. REV. 1319 (1994).

81. 460 N.W.2d 306 (Mich. Ct. App. 1990).

82. *Id.* at 307.

attorney's fees are paid by the estate and can be dispensed only with court approval.[83]

The opinion of the *Steinway* court is shared by Judge Eunice Ross of the Allegheny County Court of Common Pleas in Pennsylvania.[84] While Pennsylvania courts have not yet decided this issue, Judge Ross asserts that the attorney for the estate stands in a fiduciary relationship with the personal representative, the beneficiaries, and any legitimate creditors.[85] The attorney is bound to give wise counsel to the personal representative so that the estate may be administered in accordance with the requirements of the law of the Commonwealth.[86] The attorney also owes a duty to the estate creditors to marshal assets and pay the claims of the decedent.[87] Finally, the attorney owes a duty to the estate beneficiaries to outline the administration procedure and explain the ultimate distribution scheme.[88]

This approach has also been taken up by Professor Jeffrey Pennell.[89] However, Professor Pennell takes the entity approach one step further by viewing the estate as an "organization" within the context of Rule 1.13 of the Model Rules of Professional Conduct.[90] Professor Pennell notes that an "organization" need not be incorporated for recognition under Rule 1.13. Rather, the term may include any entity with a recognizable form, internal organization and relative permanence.[91] Under this derivative view of the entity approach, any group seen as having an identity apart from the individuals who comprise it is granted the status of "client" in the relationship with an attorney.[92] Because the attorney repre-

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83. *Id.*

84. Hon. Eunice L. Ross, *Who is the Client in an Estate?*, Pennsylvania Bar Association Mid-Year Meeting (1994) at M-2.

85. *Id.*

86. *Id.*

87. *Id.* at M-3.

88. *Id.* at M-4.

89. Pennell, *supra* note 80, at 1339.

90. Model Rule 1.13 provides:

> (a) A lawyer employed by an organization represents the organization acting through its duly authorized constituents.
>
> (b) If a lawyer for an organization knows that . . . [a constituent] . . . is engaged in an action . . . related to . . . representation that is . . . [a violation of the law] . . . and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

91. Pennell, *supra* note 80, at 1335.

92. *Id.*

sents the estate as an entity, the attorney may deal with the personal representative, the beneficiaries, and any other constituents as individuals within the entity.[93]

The nature of the relationship with the collective organization permits the attorney to consider the goals and objectives of the estate, which may or may not be consistent with those of the personal representative or beneficiaries.[94] Professor Pennell compares the attorney's situation to the representation of a corporate entity. As such, questions that arise in this context may be answered by reference to the already well established body of law concerning legal representation of corporate entities.[95] As with a corporation, the estate becomes the principal in the relationship with the attorney. The personal representative is seen as an agent of the estate who hires the attorney, thereby filling the same role as a corporate officer, who performs a similar service on behalf of a corporation. The attorney is paid by the estate she serves, not by the personal representative. In addition, the attorney may "incur responsibility to various constituents of the entity [such as the personal representative or the beneficiaries] as derivative clients . . . [However,] the organization . . . is the primary client to whom the attorney's duties are owed."[96]

According to Professor Pennell, recognizing the estate as the client clarifies the attorney's responsibilities to the various parties involved.[97] Representation is guided by objective evaluation of the best interests of the organization, rather than the various constituents. For instance, situations may arise in which the beneficiaries' interests become adverse to one another or to those of the personal representative. Situations may also arise in which the personal representative is embarking on a course that is illegal or detrimental to the estate. Such situations normally require the attorney to withdraw from representation. If the attorney represents the estate, however, she is free to take action to correct the wrongs, resolve the conflicts, and benefit the constituents and the estate as a whole.[98]

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93. *Id.* at 1336.

94. *Id.* at 1335.

95. *Id.* at 1337-39.

96. Pennell, *supra* note 80, at 1336.

97. *Id.* at 1337.

98. Professor Pennell notes that withdrawal does not serve the interests of the beneficiaries who rightly are regarded as the real parties in interest. Furthermore, it does

Professor Pennell contends that this approach clarifies questions involving loyalty and fidelity. Disclosure of otherwise confidential information to other constituents is authorized to the extent the attorney believes it reasonably necessary to further the best interests of the estate. Professor Pennell writes, "[J]ust as there are situations in which the attorney for a corporation is entitled to carry information to shareholders regarding wrongs committed by corporate officers, the analogy to carrying information to estate beneficiaries seems natural."[99] If the attorney becomes aware of injurious wrongdoing on the part of the personal representative, the attorney may also bring the matter to the attention of a supervising court.[100]

While Professor Pennell's analysis is compelling, several problems are immediately apparent. First, not all states have adopted the Model Rules of Professional Conduct.[101] This is potentially problematic, as Professor Pennell's argument hinges upon Rule 1.13, which has no counterpart in the Disciplinary Rules. As mentioned previously, Rule 1.13 concerns an attorney's representation of an organization, and consequently, its constituents. Thus, states that have not adopted the Model Rules' interpretation of an organization's representation may have difficulty coming to the same conclusions as Professor Pennell due to an inability to reconcile the differences between the Rules and the Code.

Second, Professor Pennell's comparison of the estate to a corporation, and his reliance upon established corporate law as a guide, is troublesome. Unlike corporate executive officers, personal representatives do not stand at the helm of the estate. In addition, in contrast to a corporate executive officer, personal representatives may not seek to perpetuate the existence of the estate, or generate income for the benefit of its constituents. They may only act in the interests of the beneficiaries when those interests parallel the intent

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not rectify the wrongdoing, and leaves the attorney in a difficult situation when withdrawal is required. Pennell thus views the entity approach as a solution to these problems. *Id.* at 1339.

99. *Id.* at 1337.

100. *Id.* at 1337; *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13, and comments.

101. Some 37 jurisdictions have adopted the Model Rules. ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT § 01:3 (1994). Furthermore, disciplinary rules are not binding as law upon the courts. *See, e.g., In re* Kutner, 399 N.E.2d 963 (Ill. 1979); *In re* Thatcher, 89 N.E. 39 (Ohio 1909).

of the testator. Furthermore, beneficiaries and fiduciaries do not share the same relationship with one another, or with an attorney, as do corporate constituents. For instance, a shareholder's interests may, in fact, conflict with those of a corporation or a board of directors. However, with respect to estate administration, a beneficiary's interests may not conflict with the estate's.[102] Furthermore, whereas disgruntled shareholders may oust corporate officers, disgruntled beneficiaries may not vote personal representatives out of their respective positions.[103] These significant and irreconcilable differences that exist between corporations and estates undermine the validity of Professor Pennell's comparison to the corporate organization.

Finally, and most importantly, recognition of the estate as the client is wholly inconsistent with property law, and not entirely consistent with tax law. Property law emphasizes that the estate is a mere compilation of assets and liabilities owned by the decedent prior to distribution by will or intestacy.[104] It is merely a conduit created for the sole purpose of passing a decedent's property to his beneficiaries.[105] The personal representative, appointed to administer the estate, has no interest in the estate itself.[106] The personal representative's sole purpose is to gather the decedent's assets and distribute them as quickly and efficiently as possible. Hence, it is difficult to equate an estate with a client or organization.

The estate's status as an organization fares little better under tax law. While the estate is taxed as a separate entity, the purpose

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102. As will be seen throughout this Article, it is a continuing theme, shared by both courts and commentators, that there is a potential for adversity between the beneficiaries and the personal representative. This makes little sense from an analytical standpoint. The relationship between the beneficiaries and the fiduciaries is analogous to the relationship between the decedent and the beneficiaries in this regard. The personal representative stands in the shoes of the decedent only inasmuch as an individual is required to carry out the decedent's intent. No matter how much power personal representatives wield in their ability to handle the assets, personal representatives are powerless to change the assets' ultimate destination. The very nature of the personal representative's existence is to carry out the intent of the decedent. Once this is accomplished, it becomes apparent that there is no more adversity between the beneficiaries and the personal representative or the estate, than if it were the testator himself administering the estate.

103. A personal representative may be removed, however, by petition to the court. *See* U.P.C. § 3-611(a) (1983).

104. BLACK'S LAW DICTIONARY, *supra* note 25, at 379; *see also* Hansen v. Stanton, 31 P.2d 903 (Wash. 1934).

105. *See supra* text accompanying notes 25-28.

106. *See* Eger v. Eger, 314 N.E.2d 394 (Ohio Ct. App. 1974).

of United States tax law is to allow the federal government to collect its taxes, either income or estate, before the decedent's property passes into the hands of the beneficiaries.[107] Therefore, it is apparent that an estate is not an "organization" within the meaning of Rule 1.13, or any other body of law designed to deal with an entity. Rather, the estate is a legal fiction created for a limited and specific purpose. Any attempt to treat the estate as a client gives insufficient weight to the origins, disposition, and purpose of the estate. It must not be forgotten that the creation of this conduit is a direct result of the decedent's intent, and nothing more.

B. Foreseeability Under a Negligence Approach

Another approach, lauded primarily by commentators, suggests that an attorney owes a duty of reasonable care to third parties. This approach is based upon the premise that one who chooses to act must assume liability for those actions.[108] Here, the initial threshold of duty does not pivot on the existence or nonexistence of privity. Rather, establishment of a duty requires a multi-step process. First, the plaintiff must show the "existence of an undertaking" on the part of the attorney.[109] Once an "undertaking" is shown to exist, the analysis proceeds to determining "foreseeability."[110] This, in turn, requires a three part inquiry: (1) the plaintiff must be foreseeable; (2) the plaintiff's reliance upon the attorney must be foreseeable; and (3) the resulting harm must have been foreseeable.[111] Thus, to prove the requisite duty of care, third parties must show that the "undertaking" was one that foreseeably affected their interests.[112] Accordingly, "when professionals undertake tasks for their clients, their expertise and knowledge can induce reliance in parties with whom they are not in privity."[113]

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107. 26 U.S.C. § 641 (1988); Mott v. United States, 462 F.2d 512 (Ct. Cl. 1972), *cert. denied*, 409 U.S. 1108 (1973).

108. Eisenberg, *supra* note 79, at 127.

109. *Id.* at 145; *see also* Glanzer v. Shepard, 135 N.E. 275 (N.Y. 1922) (One who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.).

110. Eisenberg, *supra* note 79, at 152.

111. *Id.* at 152-56.

112. This conforms to the principle set forth by Judge Cardozo in *Glanzer*, 135 N.E. at 277: "[D]iligence was owing, not only to him who ordered, but to him also who relied."

113. Eisenberg, *supra* note 79, at 152.

"Foreseeability" depends on the identification of the beneficiaries as potential plaintiffs and the likelihood that they will rely on the attorney's action.[114] In the case of an attorney representing a personal representative, this requirement is easily fulfilled since the attorney knows that her work has a direct effect not only on the personal representatives, but on the beneficiaries as third parties.

Two primary policies underpin this approach. First, liability through an assumed duty satisfies such social policies as compensating innocent victims and preventing lack of care in attorney actions. Second, economic policies of efficiency and risk allocation are promoted.[115] Proponents argue that attorneys should bear the cost of injury because they have the benefit of greater expertise and easier access to information.[116] Attorneys, as professionals, are deemed to possess knowledge and expertise "above the level of the marketplace."[117] Therefore, they should be held to a higher standard of care, as are other professionals.[118]

The primary disadvantage of this approach is the fear that its application will result in potential liability to an overbroad class of harmed individuals. This fear was enunciated over a century ago in *Winterbottom v. Wright*,[119] in which an English mailcoach driver sued the manufacturer of a defective coach. The manufacturer owed a duty to the driver's employer to build and maintain the coaches it supplied. The driver alleged that he had been injured by latent defects in the coach. Noting the absence of privity between the driver and the manufacturer, the court refused

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114. *Id.* at 155.

115. The justification for risk allocation is that attorneys are better able to insulate themselves from heavy losses than are innocent third parties due to attorneys' ability to procure insurance, and because attorneys' skill and knowledge puts them in a better position to assess risks.

116. Eisenberg, *supra* note 79, at 128.

117. Security Sav. Bank v. Kellems, 9 S.W.2d 967, 970 (Mo. 1928); *see also* Bailey v. Tucker, 621 A.2d 108 (Pa. 1993) (attorney who agrees to representation impliedly agrees to provide a level of services consistent with those of the profession at large); Walker v. Bangs, 601 P.2d 1279 (Wash. 1979).

118. The comparison being made is to medical doctors, who are held to a higher standard of care than "persons on the street." A plaintiff in a medical malpractice action usually must establish the standard of care through expert testimony. The plaintiff must then prove that, in light of these standards, the doctor was unskillful or negligent. *See, e.g.*, Walski v. Tiesenga, 381 N.E.2d 279 (Ill. 1978); *see also* Wall v. Stout, 311 S.E.2d 571 (N.C. 1984) (specialists are held to standard of their specialties, not to standards of profession as a whole).

119. 152 Eng. Rep. 402 (1842).

to recognize a duty running from the manufacturer to the driver. Specifically, the court stated:

> If we were to hold that [a third party] could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty. The only real argument in favor of the action is, that this is a case of hardship; but that might have been obviated, if the plaintiff had made himself a party to the contract.[120]

While this rule has been obliterated in its applicability to product liability cases, the principles remain relevant and applicable to attorney-client situations. Without established boundaries, an attorney's ability to gauge the nature and extent of his obligations, and the potential risk of liability, is severely hampered.[121] To hold an attorney liable to such a potentially large class hampers the attorney's ability to represent his client, and the legal system invariably suffers as a result.

C. Third Party Beneficiary Approach

The third party beneficiary doctrine is derived from contract law. Generally, a third party may sue on a contract, despite a lack of privity, when two parties enter into an agreement with an intent to confer a direct benefit upon the third party.[122] The leading case from which this doctrine is derived is *Lawrence v. Fox*.[123]

Decided by the New York Court of Appeals, *Lawrence* presents the classic third party beneficiary situation. In *Lawrence*, the promisee lent the promisor $300 on the condition that the promisor pay the same amount to a named third party the next day. Had the promisor performed, the promisee would have been free of a debt he owed the third party, and the promissor would have been free of the debt he owed the promissee. When the promisor failed to perform, the court sustained a suit by the third party against him, despite the lack of privity.[124] The decision was based upon notions of equity and fairness; the promisee owed a

120. *Id.*
121. MALLEN, *supra* note 11, at 361.
122. Flaherty v. Weinberg, 492 A.2d 618 (Md. 1985).
123. 20 N.Y. 268 (1859).
124. *Id.* at 279.

duty to the third party, and the promissor agreed to take on that duty, but failed to do so. Thus, the third party, who is owed the duty, is the appropriate party to bring suit.[125]

In a legal malpractice context, this approach recognizes that an attorney, as promisor, and a client, as promisee, have the power to create rights in an estate beneficiary.[126] Thus, the attorney owes a duty to a beneficiary when circumstances indicate that the agreement was made for the beneficiary's benefit.[127] The estate beneficiary is considered an "intended" beneficiary of the promise.[128]

Although the third party beneficiary approach primarily grants reprieve to third parties in non-adversarial situations,[129] traditional barriers remain strong in instances where adversarial situations may arise.[130] The rationale for these barriers is stated by the Illinois Supreme Court in *Pelham v. Griesheimer*.[131] *Pelham* involved an action by children of a client against an attorney who had procured a divorce and a property settlement for the client. The court held that the claimants were, at best, incidental beneficiaries of the employment.[132] Specifically, the court stated: "In the area of legal malpractice, the attorney's obligations to his client must remain paramount."[133] The *Pelham* court noted the predominantly adversarial nature of divorce proceedings, and invoked the traditional privity requirement against the children. Envisaging the various interests of mother and child that might collide upon

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125. *Id.*

126. *See* RESTATEMENT (SECOND) OF CONTRACTS n.2, 438 (1981).

127. MALLEN, *supra* note 11, at 385.

128. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(b). Intent is the critical factor in applying the third party beneficiary approach.

129. For example, beneficiaries of a poorly drafted will are protected from the negligence of the drafting attorney. *See, e.g.*, Guy v. Liederbach, 459 A.2d 744 (Pa. 1983). The rationale is that there is an underlying contract between a testator and an attorney for the drafting of a will. The will serves as a manifestation of the intent of the parties to benefit the named legatees through performance of the contract. *See, e.g.*, Lucas v. Hamm, 364 P.2d 685 (Cal. 1961); Copenhaver v. Rogers, 384 S.E.2d 593 (Va. 1989). This theory is not limited to contract. Actions in negligence also may be brought against an attorney under a third party beneficiary approach. *See* Hale v. Groce, 744 P.2d 1289, 1292 (Or. 1987) ("[U]nder [a] third-party analysis the contract creates a 'duty' not only to the promisee, the client, but also to the intended beneficiary, [therefore] negligent nonperformance may give rise to a negligence action as well.").

130. *See* MALLEN, *supra* note 11.

131. 440 N.E.2d 96 (Ill. 1982).

132. *Id.*

133. *Id.*

divorce, the court found: "We refuse to create such a wide range of potential conflicts by imposing such duties upon an attorney in favor of a non-client, unless the intent to benefit the third party is clearly evident."[134]

Applying the *Pelham* rule, the Illinois Appellate Court rejected the notion of a duty owed by an attorney to an estate beneficiary. In *Neal v. Baker,*[135] a named beneficiary of a testator's estate filed a complaint against the attorney hired by a personal representative to assist in administering the estate, alleging that the attorney's negligence caused her monetary damage.[136] The trial court dismissed the plaintiff's complaint,[137] holding that to support a legal malpractice claim, the plaintiff must show that the attorney-client contract was entered into with a specific intent to directly benefit the plaintiff as a third party beneficiary.[138]

On appeal, the Illinois Appellate Court stated that an attorney owes a duty to a non-client only in the most limited circumstances.[139] Essentially, the attorney owes a duty only to "intended beneficiaries" of a relationship between a client and the attorney.[140] Reiterating the concerns of the court in *Pelham,* the *Neal* court noted that an estate beneficiary often becomes "the opposing party in an adversarial forum."[141] The beneficiary, therefore, must offer a clear indication that the attorney's representation is intended directly to confer a benefit upon her.[142] The court declined to hold that a clear indication existed here:

> [I]t is clear that [the plaintiff] was not a direct third-party beneficiary. The primary purpose of the attorney-client relationship between [the personal representative] and defendant was to assist [the personal representative] in the proper administration of its duties. It is obvious that defendant could not have been hired with the intent to directly benefit [plaintiff] when the adversarial nature of the relationship between [plaintiff] and the attorney becomes evident.
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> . . . .

134. *Id.*
135. 551 N.E.2d 704 (Ill. App.), *appeal denied*, 555 N.E.2d 378 (Ill. 1990).
136. *Id.* at 705.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Neal*, 551 N.E.2d at 705.
141. *Id.* at 706.
142. *Id.*

> Plaintiff's mere assertion that the attorney was hired with the intent to directly benefit plaintiff is not sufficient to state a cause of action. The intent plaintiff referred to in her complaint was nothing more than the general intent implicit in an executor hiring an attorney to assist in administering the estate. We hold no duty extends to a beneficiary under these circumstances.[143]

The primary rationale for refusing to recognize estate beneficiaries as "intended beneficiaries" is the relationship between the beneficiary and the personal representative. The potential for adversity leaves them as "incidental" beneficiaries to the agreement between the personal representative and the attorney.[144]

Recognizing a duty only to "intended beneficiaries" has several advantages. The beneficiaries named by a testator are able to enforce their rights and receive their intended benefits, which certainly is consistent with notions of justice and equity. The courts' refusal to recognize such a duty seems contrary to common sense and the nature of the attorney's purpose. Furthermore, recognizing a duty running from the attorney to the beneficiaries is fairly restrictive in establishing the class of individuals to whom the attorney is liable. As a result, the fears set forth in *Winter-*

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143. *Id.*

144. *Id.*; *see also* Rutkoski v. Hollis, 600 N.E.2d 1284 (Ill. App. Ct. 1992). Even if the plaintiff properly alleged that an estate beneficiary is an "intended" beneficiary of the relationship between a personal representative and an attorney, the action could not be brought successfully because of the potentially adversarial relationship between the personal representative's interests and the interests of the beneficiaries.

The rationale of the Illinois courts, and all other courts that apply the third party beneficiary analysis, is inherently flawed. An attorney hired by a personal representative does not represent the personal representative in the representative's personal capacity, rather she represents the office. The entire purpose of estate administration is the dissolution of the estate and distribution of the assets to the intended beneficiaries. To carry out this purpose, the law recognizes a legal fiction in either the estate administrator or personal representative. Estate administration is geared toward carrying out the intent of the testator to benefit the legal heirs or beneficiaries. The existence of duties to the beneficiaries inure to the very nature of the relationships involved. Therefore, it seems absurd to say that those whom the entity is created to benefit are considered "incidental." The relationship between an attorney and the beneficiaries during estate administration is analogous to the relationship between a drafting attorney and the beneficiaries under a will before the testator dies. There, as here, the beneficiaries are named by the testator. In the first situation, the testator lives; in the second, he is dead, and the personal representative stands in his shoes. The essence of the personal representative's duty is to carry out the intentions of the testator, and thereby to benefit the named beneficiaries. Thus, it becomes apparent that no more potential for adversity between the beneficiaries and the personal representative exists than if the testator were to administer the estate himself.

bottom v. Wright[145] are not likely to be realized because the attorney does not owe a universal duty. Rather, she owes a duty only to individuals contemplated by the parties entering into the agreement.[146]

However, the primary concern of courts that adopt this approach seems to center around the potential adversarial relationship between the personal representative and the beneficiaries. Courts fear that recognizing a duty to both the personal representative and the beneficiaries creates an untenable conflict of interest for attorneys and hampers their ability to represent their clients, the personal representatives, adequately. Presumably, the fear is that attorneys' ethical obligations to clients are undermined if they are held to owe a duty to non-client beneficiaries. The prevailing view is that a conflict of interest arises whenever the interest of the personal representative is not entirely consistent with the interest of a beneficiary. Thus, as a policy matter, courts applying a third party beneficiary approach refuse to recognize a duty owed by attorneys to estate beneficiaries.[147]

Regardless of whether one agrees with this analysis, no court to date has used an intended beneficiary analysis to recognize a duty owed to estate beneficiaries by an attorney hired to assist in estate administration. Courts applying a third party beneficiary approach have held invariably that an estate beneficiary is "incidental" rather than "intended," and therefore, have declined to recognize a duty on the part of the attorney.[148]

D. Multi-Factor Balancing — Another Negligence Approach

Based on general negligence principles, the multi-factor balancing approach was the first to depart from the historical requirement of privity as a foundation for third party liability. The

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145. *See supra* notes 119-20 and accompanying text.

146. It should be noted, however, that a third party beneficiary approach is not entirely restrictive; the intentions of the parties in making the contract remains a question of fact, and thus, is subject to erosion with time and changing social attitude.

147. *See, e.g.*, Trask v. Butler, 872 P.2d 1080 (Wash. 1994); Neal v. Baker, 551 N.E.2d 704 (Ill. App. Ct. 1990).

148. *See, e.g.*, Hopkins v. Akins, 637 A.2d 424, 428 (D.C. App. Ct. 1993) ("Whether a beneficiary of an estate may sue the attorney of the personal representative for negligence is an issue this court has not had occasion to decide. We now join the broad majority of the courts considering the question and hold . . . that no such duty exists.").

balancing approach first was applied by the California Supreme Court in *Biakanja v. Irving*.[149]

Biakanja involved a notary public who illegally and negligently prepared a will for a client. The will was held invalid because the notary failed to have it properly attested in accordance with California law,[150] and as a result, the decedent's estate was distributed in accordance with California intestacy law.[151] The decedent's sister sued the notary to recover the difference between what she would have received under the will, had it been valid, and the amount actually distributed to her.[152] The California Supreme Court, sitting *en banc*, held that the notary was under a duty to exercise due care to protect the plaintiff from injury.[153] Further, the notary was liable for damages caused to the plaintiff by his negligence, even though they were not in privity of contract.[154]

The *Biakanja* court determined that a duty to third parties could be imposed, as a matter of policy, by balancing the following six factors:

> (1) the extent to which the transaction was intended to affect the plaintiff;
> (2) the foreseeability of harm to the plaintiff;
> (3) the degree of certainty that the plaintiff suffered injury;
> (4) the closeness of the connection between the defendant's conduct and the injuries suffered;
> (5) the policy of preventing future harm; and
> (6) whether recognition of liability under the circumstances would impose an undue burden on the profession.[155]

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149. 320 P.2d 16 (Cal. 1958).
150. *Id.* at 18.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Biakanja*, 320 P.2d at 19.
155. *Id.* at 19. Note that the *Biakanja* court actually used "the moral blame attached to the defendant's conduct" as one of its balancing factors. This factor was later dropped by the California Supreme Court in Lucas v. Hamm, 364 P.2d 685 (Cal. 1961), and replaced with the current factor, "whether recognition of liability under the circumstances would impose an undue burden on the profession." *See infra* notes 157-62 and accompanying text; *see also* Goldberg v. Frye, 266 Cal. Rptr. 483 (Cal. Ct. App. 1990).

Since the balancing test was applied first by the *Biakanja* court, other jurisdictions have adopted it and applied this test in numerous situations.[156]

Three years after the *Biakanja* decision, the California Supreme Court applied the balancing approach to a case involving an attorney who had negligently drafted a will. In *Lucas v. Hamm*,[157] an attorney agreed to prepare a will for his client, which named the plaintiffs as beneficiaries. The attorney negligently inserted language that violated California law relating to restraints on alienation and the rule against perpetuities.[158] As a result, the plaintiffs received a lesser amount than they would have had the pertinent language been valid.

The beneficiaries sued the attorney for damages arising from his negligence.[159] Although the court refused to hold the attorney liable,[160] the court confirmed the applicability of the balancing approach and recognized the existence of a duty owed to the beneficiaries by the attorney.[161] In particular, the court noted that the recognition of a duty in this context does not impose an undue burden on the legal profession. This finding is further supported "when we consider that a contrary conclusion would result in the innocent beneficiary bearing the loss."[162]

The *Biakanja* and *Lucas* decisions have made significant inroads in legal malpractice situations. Courts applying the balancing approach, however, have not recognized a duty owed by

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156. *See, e.g.*, Westerhold v. Carroll, 419 S.W.2d 73 (Mo. 1967) (architects); Title Ins. Co. of Minn. v. Construction Escrow Serv., 675 S.W.2d 881 (Mo. App. Ct. 1984) (escrow agents); Aluma Kraft Mfg. Co. v. Elmer Fox & Col, 493 S.W.2d 378 (Mo. App. Ct. 1973) (accountants); *cf.* Coleco Indus., Inc. v. Berman, 423 F. Supp. 275 (E.D. Pa. 1976).

157. 364 P.2d 685 (Cal. 1961).

158. *Lucas*, 364 P.2d at 686.

159. *Id.*

160. The court acknowledged that the questions before it have long perplexed courts, practitioners, and commentators. Therefore, it would be improper to hold the defendant liable for failing to adhere to a standard higher than one of ordinary skill and capacity. *Id.* at 689-90 ("The attorney is not liable for every mistake he may make in his practice; he is not . . . an insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well informed lawyers.").

161. *Id.* at 688-89 ("Since defendant was authorized to practice [law], we must consider an additional factor not present in *Biakanja*, namely, whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession.").

162. *Id.* at 688.

an attorney to estate beneficiaries when hired by a personal representative.[163] In *Goldberg v. Frye,*[164] the California Court of Appeals directly confronted this issue. The *Goldberg* case evolved from a complicated set of facts involving a divorce agreement between the decedent and his ex-wife.[165] The decedent subsequently made several intervivos gifts to a charitable trust in violation of that agreement.[166] The personal representative then arranged a settlement to a suit filed by the ex-wife against the estate.[167] The settlement payments significantly depleted the assets of the estate, making it impossible to pay specific bequests to the estate beneficiaries.[168]

The beneficiaries filed a complaint against both the personal representative and the attorney hired to assist in estate administration.[169] The complaint alleged that the attorney had acted imprudently when he negotiated the settlement agreement.[170] The complaint further alleged that the attorney had failed to give adequate notice to the beneficiaries of the effect the agreement would have upon their expectancies.[171] The court did not address the issue of negligence on the part of the attorney; it simply refused to recognize a duty.[172]

The *Goldberg* court only briefly addressed the *Lucas* and *Biakanja* decisions. Instead, the court chose to rely upon a reiteration of the balancing test in a leading treatise on legal malprac-

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163. Applying a combined third party beneficiary balancing approach, the Washington Supreme Court held that a duty is not owed from an attorney hired by the personal representative to the estate or to the estate beneficiaries because (1) the estate and its beneficiaries are incidental, not intended, beneficiaries of the attorney-personal representative relationship, (2) the estate heirs may bring a direct cause of action against the personal representative for breach of fiduciary duty, and (3) the unresolvable conflict of interest an estate attorney encounters in deciding whether to represent the personal representative, the estate, or the estate heirs unduly burdens the legal profession. Trask v. Butler, 872 P.2d 1080 (Wash. 1994); *see also* Hopkins v. Akins, 637 A.2d 424 (D.C. App. Ct. 1993). The principal reason for the rule that an attorney hired by an executor owes no duty to the beneficiaries of the estate is the potentially adversarial relationship that exists between an executor's interest in administering the estate and the interests of the beneficiaries of the estate.

164. 266 Cal. Rptr. 483 (Cal. Ct. App. 1990).

165. *Id.* at 484-85.

166. *Id.*

167. *Id.* at 485.

168. *Id.*

169. *Goldberg*, 266 Cal. Rptr. at 485.

170. *Id.*

171. *Id.*

172. *Id.* at 489-90.

tice.[173] However, the court's analysis echoed a third party beneficiary approach rather than a balancing test.[174] Specifically, the court stated that the predominant inquiry is whether the principal purpose of the attorney's retention is to provide legal services for the benefit of the plaintiff.[175] Viewing the legatees' claim in this light, the court found it "impossible to conclude that the parties to the attorney's contract . . . entered into same for the principal purpose of providing benefit to the legatees."[176]

As with any of foregoing approaches, the balancing approach has certain benefits. First, applying a balancing test advances the policy goals of providing remedies to innocent victims of negligent attorneys, forcing these attorneys to bear the cost of their negligence and deterring legal malpractice in general. Second, the multi-factor balancing test is fairly well established and has been applied in a number of other situations.[177] This is particularly useful, as it is easily referenced and familiar to both courts and practitioners.

However, the balancing approach has several apparent disadvantages as well. First, although this approach has been used in many jurisdictions and in a number of situations, it is not always easy to apply.[178] The difficulty in applying the balancing approach may explain why California courts have effectively reduced the approach to a single third party beneficiary factor in difficult situations.[179] In addition, no court has applied this approach to the attorney-personal representative-beneficiary relationship in a

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173. *Id.* at 489 (citing MALLEN, *supra* note 11).

174. California courts, despite having authored the multi-factor balancing test, seem reluctant to apply it in the way it was applied by the *Biakanja* court. For instance, in Goodman v. Kennedy, 556 P.2d 737 (Cal. 1976), purchasers of corporate stock brought a legal malpractice claim against the attorney for the corporate officers. The plaintiffs alleged that the attorney had incorrectly advised the officers as to the sale of the stock resulting in violations of Federal Stock Registration requirements. The supreme court rejected the malpractice claim, emphasizing that the agreement between the attorney and the officers was in no way intended to benefit the plaintiffs as purchasers of stock. *Id.* at 743.

175. *Goldberg*, 266 Cal. Rptr. at 489.

176. *Id.* The court rested its decision primarily upon the "well established" body of law that recognizes the personal representative as the client, not the estate or beneficiaries: "By assuming a duty to the [personal representative], an attorney undertakes to perform services which may benefit [beneficiaries] of the estate, but he has no contractual privity with [them]." *Id.* at 488.

177. *See generally* MALLEN, *supra* note 11, at 383-84.

178. *See* Colaprico v. Sun Microsystems, Inc., 758 F. Supp 1335 (N.D.Cal. 1991) (the test is too unreliable for close cases).

179. *See Goldberg*, 266 Cal. Rptr. at 483; *Goodman*, 556 P.2d at 742 (citations omitted).

manner favorable to the beneficiary. In fact, every court applying a balancing test to this issue has refused to recognize any duty owed by an attorney to a beneficiary. Once again, the primary rationale focuses on the adversarial relationship between the estate beneficiaries and the personal representative. Finally, application of the balancing test does not place any concrete restrictions on the courts applying it. Once again, the attorney's ability to predict who will be adversely affected by her actions is seriously impaired. Thus, as one commentator put it: "[T]he balancing of factors test substitutes ad hoc determinations for principled and predictable analysis."[180]

E. Pass Through Privity Approach

The final approach, pass through privity, results in attorney liability to estate beneficiaries through the attorney's relationship with the personal representative who hired her. Thus, under this approach, the attorney owes a duty to the beneficiary vis-a-vis the attorney's duty to the personal representative and the personal representative's duty to the beneficiary: hence the term "pass through privity."

This approach has been applied by Ohio courts to a number of legal malpractice situations.[181] For example, in *Elam v. Hyatt Legal Services*,[182] the Ohio Supreme Court directly addressed the duty owed by an attorney hired by a personal representative to the beneficiaries of an estate. In *Elam*, the decedent left her husband a life estate in a piece of real property,[183] and also named him personal representative to her estate.[184] As personal representative, he hired the defendant attorney to assist in administering the estate.[185] During the course of administration, the attorney recorded a certificate of transfer, which transferred the devised real

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180. Timothy L. Hall, *Legal Malpractice in Mississippi: Suits by Non-Clients*, 64 MISS. L.J. 1, 20 (1994); *see also* Guy v. Liederbach, 459 A.2d 744 (Pa. 1983) (rejecting the balancing test on the grounds that it "has proved unworkable and led to ad hoc determinations and inconsistent results").

181. *See, e.g.*, Arpadi v. First MSP Corp., 628 N.E.2d 1335 (Ohio 1994) (attorneys hired by general partners owe duty to limited partners); Elam v. Hyatt Legal Serv., 541 N.E.2d 616 (Ohio 1989) (attorney hired by personal representative owes duty to estate beneficiaries).

182. 541 N.E.2d 616 (Ohio 1989).

183. *Id.*

184. *Id.* at 616.

185. *Id.*

estate to the husband in fee simple.[186] The remaindermen settled with the executor, and subsequently sued the defendant's law firm for damages arising from negligence in handling the estate.[187] Both the trial court and the appellate court held that the attorney owed no duty to the named beneficiaries, since the attorney represented the personal representative.[188]

The Ohio Supreme Court disagreed and held that the attorney owed a duty to the estate beneficiaries. The court based its decision on two fundamental concepts. First, the court found that the personal representative owes an affirmative duty to the estate beneficiaries: "It is the duty of the fiduciary of an estate to serve . . . the entire estate. . . . [He therefore] owes a duty to [the] beneficiaries to act in a manner which protects [their] interests."[189] Second, the court concluded that the attorney and the personal representative are in direct privity with one another: "In probate, the attorney-client relationship exists between the attorney and the [personal representative]."[190] Specifically, the court found: "A beneficiary whose interest in an estate is vested is in privity with the fiduciary of the estate, and where such privity exists the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney's negligent performance."[191]

The *Elam* court's decision certainly is not in concurrence with the vast majority of courts that have addressed this issue.[192] However, this decision has established in Ohio that an attorney

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186. *Id.*

187. *Elam*, 541 N.E.2d at 616.

188. *Id.*

189. *Id.* at 618; *see also supra* notes 29-44 and accompanying text.

190. *Elam,* 541 N.E.2d at 616.

191. *Id.* at 618.

192. *See, e.g.*, Steinway v. Bolden, 460 N.W.2d 306 (Mich. App. Ct. 1990); Neal v. Baker, 551 N.E.2d 704 (Ill. App. Ct. 1992); Trask v. Butler, 872 P.2d 1080 (Wash. 1994); Hopkins v. Akins, 637 A.2d 424 (D.C. App. 1993); Goldberg v. Frye, 266 Cal. Rptr. 483 (Cal. Ct. App. 1990). The Standing Committee on Ethics and Professional Responsibility of the American Bar Association also rejects this view. In a formal opinion released May 9, 1994, the Committee stated: "The fact that the personal representative client has obligations toward the beneficiaries does not impose parallel obligations on the lawyer . . . A lawyer's duty of confidentiality to a client is not lessened by the fact that the client is a personal representative. Although the Model Rules prohibit a lawyer from participating in a criminal or fraudulent activity or active concealment of a client's wrongdoing, they do not authorize a lawyer to breach confidence to prevent such wrongdoing." ABA Comm. on Ethics & Professional Responsibility, Formal Op. 94-380 (1994).

retained by a personal representative owes a duty to those with whom the client has a fiduciary relationship.

The Ohio Supreme Court reaffirmed its decision in *Elam* in *Arpadi v. First MSP Corp.*[193] This case addressed the issue of whether an attorney hired by a general partner owes a duty to the limited partners.[194] The court rejected the attorney's argument that recognition of such a duty creates an ethical dilemma.[195] Furthermore, the court held that the attorney misperceived the nature of the partnership relationship.[196] Ohio law adheres to the principle that a partnership is an aggregate of individuals and does not constitute a separate legal entity.[197] However, the court held that an attorney owes a duty to a third party when a third party is in privity with the individual or entity responsible for the attorney's retention.[198] The court stated: "*A fortiori* those persons to whom a fiduciary duty is owed are in privity with the fiduciary such that an attorney-client relationship established with the fiduciary extends to those in privity therewith regarding matters to which the fiduciary duty relates."[199] As a result, the court held that the duty arising from the attorney-client relationship extended to the limited partnership, since "the fiduciary relationship between the general partner and the limited partners provides the requisite element of privity recognized under *Elam* . . . ."[200]

The essence of the pass through privity approach is that the duty arising from the attorney-client relationship between the attorney and the personal representative is viewed as extending in full to the beneficiaries of the estate. The relationship shared by the personal representative and the beneficiaries provides the

193. 628 N.E.2d 1335 (Ohio 1994).

194. *Id.* at 1338.

195. *Id.*

196. *Id.* Defendants supported their argument by citing the Code of Professional Responsibility for the proposition that no duty is owed to limited partners by an attorney representing the partnership. *See* EC 5-18 ("A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by thee personal desires of any person or organization.").

197. *Arpadi*, 628 N.E.2d at 1338; *see also* OHIO REV. CODE ANN. § 1775.05(A) (1994); Byers v. Schlupe, 38 N.E. 117 (Ohio 1894).

198. *Arpadi*, 628 N.E.2d at 1338.

199. *Id.* at 1339.

200. *Id.*

requisite element of privity to establish a duty running from the attorney to the beneficiaries.[201]

Pass through privity has several advantages. First, the concept fully recognizes the nature of the estate and does not impinge upon either property or tax law. Recognizing a duty running from the attorney to the beneficiaries through the personal representative gives full accord to the conduit principle adopted by both bodies of law.[202] Second, pass through privity acknowledges the scope of a fiduciary relationship and an attorney's proper role without painting it too broadly. The approach recognizes a duty owed to a third party only in very specific situations. The attorney owes a duty only to those who share a fiduciary relationship with the hiring client. Thus, all of the individuals to whom the attorney might potentially be liable are immediately identifiable as individuals to whom the personal representative owes a duty, thereby providing the attorney with a degree of certainty in performing her duties. Third, the duty owed by the attorney to the beneficiaries is clear. The personal representative's duty to the estate beneficiaries becomes the duty of the attorney, given the nature of the personal representative's existence.

Pass through privity thus alleviates, rather than exacerbates, potential adversity between the personal representative and the beneficiaries. The attorney is required to disclose fully, and to all parties concerned, the effects of the testamentary devise and local law. In addition, the attorney is able to provide advice to beneficiaries and the personal representative regarding proper allocation of receipts or disbursements of income or principal. Relevant tax issues also may be freely discussed among the parties.[203] While it seems odd not to include the beneficiaries in discussions that impact them so significantly, recognition of the personal representative as a client in the traditional sense has just that effect.

The most significant problem facing the pass through privity approach stems from the ethical implications of recognizing a duty to any third party. These duties are set forth in a variety of contexts, including the Model Rules of Professional Conduct.

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201. *Id.* at 1339.

202. *See supra* notes 26-28 and accompanying text.

203. For example, the parties may discuss the possibility and applicability of disclaimers, QTIP elections, full utilization of the marital deduction, allocation of the GST exemption, timing of retirement plan distributions and the income tax ramifications of such, or use of administration expenses as estate tax or income tax deductions.

However, the Model Rules do not deal with an attorney's conduct when the attorney is involved in estate administration. The only specific reference to estate administration is located in the official comment to Rule 1.7, which addresses conflict of interest: "In estate administration, the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the personal representative; under another view the client is the estate or trust, including its beneficiaries."[204] This is far from dispositive as to the responsibility of the attorney to the estate beneficiaries. The failure of the Model Rules to address this situation is not surprising, as their focus is primarily upon the attorney's role as representative rather than counselor.[205] Arguments concerning ethical considerations between estate beneficiaries and attorneys hired to assist in estate administration based upon the Model Rules, thus, are ill founded. Admittedly, there are situations when the personal representative and the beneficiaries may not agree. This does not mean, however, that potential adversity exists which should block a duty owed to beneficiaries by the attorney. Adherence to any approach that refuses to recognize a duty for these reasons may be convenient for practitioners, but flies in the face of the very nature of estate administration.

The legal profession is not one that can rely on convenience to form its rules and codes of conduct. A balancing must occur. Are we more concerned with the attorney's relationship with her client, or the interests of third parties who played no role in the agreement between the attorney and the personal representative? Pass through privity recognizes that the attorney's relationship with the personal representative does not exist in a vacuum, separate and distinct from the personal representative's relationship with the beneficiaries.

VII. Conclusion

The issue of liability running from an attorney to beneficiaries in estate administration is complex. However, once we recognize the nature of the beast we are dealing with, it is easier to see what is required to placate it. The goal of estate administration is to carry out the intent of the decedent or the purpose of state intestacy laws. In either case, that purpose is to gather and

204. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7, cmt. 13 (1995).
205. *See id.* Rules 2.1-2.3.

distribute estate assets as quickly as possible. It seems only natural that the duties owed by the personal representative to the beneficiaries should be shared in full with the attorney hired to assist in administering the estate. This result is realized most effectively by taking a pass through privity approach.

Pass through privity, as a concept, does not rely on troublesome and unworkable analogies. It gives full recognition to the nature and purpose of the estate without imposing an unreasonable burden on the attorney. Pass through privity realizes the societal need to afford adequate remedies to injured parties without holding the attorney liable to an over-broad class of individuals. In fact, it is limited to a very specific class of individuals: the estate beneficiaries.

Recognition of a pass through privity concept substantially clarifies an attorney's role in estate administration. A duty to fully disclose all information pertaining to estate administration to the estate beneficiaries is presumed. Perceived ethical problems are alleviated, since the attorney is required to give full disclosure of administrative matters to all parties involved. Full disclosure of all information relating to estate administration also prevents situations that might be misperceived as adversarial.

In sum, attorneys should owe a duty of care to estate beneficiaries. The imposition of this duty is in accord with societal demands and public policy. Recognition of this duty, however, must be consistent with established principles of property and tax law. Pass through privity accomplishes these goals without being overly broad in the class of individuals to whom the attorney will be held liable.